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Nos. 05-908 & 05-915

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

PARENTS INVOLVED IN COMMUNITY SCHOOLS,
Petitioner,

v.

SEATTLE SCHOOL DISTRICT NO. 1, *ET AL.*,
Respondents.

CRYSTAL D. MEREDITH, CUSTODIAL PARENT AND NEXT FRIEND OF JOSHUA RYAN MCDONALD,
Petitioner,

v.

JEFFERSON COUNTY BOARD OF EDUCATION, *ET AL.*,
Respondents.

On Writs of Certiorari to the United States Courts of Appeal for the Ninth and Sixth Circuits

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BRIEF OF DAVID J. ARMOR, ABIGAIL THERNSTROM, AND STEPHAN THERNSTROM AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICI CURIAE*[1]

Amici curiae are David J. Armor,[2] Abigail Thernstrom,[3] and Stephan Thernstrom,[4] social scientists who have conducted

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[1] This amicus brief is filed with the consent of the parties. Counsel for the Petitioners and Respondents have granted blanket consent for the filing of amicus briefs in these cases, in accordance with this Court's Rule 37.3(a). Pursuant to Rule 37.6, the *amici* submitting this brief and their counsel hereby represent that no party to these cases nor their counsel authored this brief in whole or in part, and that no person other than *amici* and their counsel paid for or made a monetary contribution toward the preparation and submission of this brief.

[2] Dr. David J. Armor is a Professor of Public Policy at George Mason University, where he served as Director of the PhD Program from 2002 to 2005. He has conducted research and written widely in the fields of education and education reform, school desegregation and related civil rights issues, and military manpower. He has consulted on and testified as an expert witness in more than 40 school desegregation and educational adequacy cases, and he has testified on school desegregation issues before the U.S. Senate, the U.S. House of Representatives, and the U.S. Commission on Civil Rights. In 1999 he was appointed to the National Academy of Science Committee on Military Recruiting. He is currently studying the effects school racial composition on academic achievement, as well as the effects of family vs. school factors on the achievement gap, supported by grants from various organizations.

[3] Abigail Thernstrom is Senior Fellow at the Manhattan Institute and the Vice-Chair of the United States Commission on Civil Rights. With her husband Stephan, she is the author of *America in Black and White: One Nation, Indivisible* and of *No Excuses: Closing the Racial Gap in Learning*, and editor of *Beyond the Color Line: New Perspectives on Race and Ethnicity in America*, and is currently working on another joint volume on the concept of *de facto* segregation, particularly in K-12 education and in housing. Her other books include the prize-winning *Whose Votes Count? Affirmative Action and Minority Voting Rights* and *School Choice in Massachusetts*. Dr. Thernstrom has been a member of the Massachusetts State Board of Education since 1995.

[4] Stephan Thernstrom is Winthrop Professor of History at Harvard University and Senior Fellow at the Manhattan Institute. In recent years he has worked collaboratively with his wife Abigail on the volumes mentioned above. His other books include the *Harvard Encyclopedia of*

research and written widely in the fields of race, education, school desegregation, and related civil rights issues.

In this brief, *amici curiae* present a critical examination of the social science research relevant to the Court's evaluation of whether these two student assignment plans survive the strict scrutiny analysis required when government actors engage in race-based decision making.[5]

STATEMENT OF THE CASE

The Jefferson County Plan. The 2001 student assignment plan imposed by the Jefferson County Public Schools classifies students by race for the express purpose of achieving a preferred range of racial balance at every school in the district (the "Jefferson County Plan"). *See McFarland v. Jefferson County Pub. Schs.*, 330 F.Supp. 2d 834, 842 (W.D.Ky. 2004). Although students are allowed to apply to their preferred school for enrollment, each school is required to attempt to manage its enrollment to achieve specific targets: the minimum number of black students is fixed at 15% of a school's enrollment and the maximum number of black students is fixed at 50% of a school's enrollment. *Id.* at 842, 844-48.

American Ethnic Groups; A History of the American People; *Poverty and Progress: Social Mobility in a 19th-Century City*; and *The Other Bostonians: Poverty and Progress in the American Metropolis, 1880-1970*, winner of the Bancroft Prize in American History.

[5] In *Grutter v. Bollinger*, the Court relied upon social science and other evidence of the benefits of diversity presented by *Amici Curiae*. *Grutter v. Bollinger*, 539 U.S. 306, 330 (2003) (citing to briefs submitted by the American Educational Research Association et al.; 3M et al.; General Motors Corp.; Julius W. Becton, Jr., et al.) The Court also cited studies that were not introduced into evidence at trial, *Id.* at 330 ("In addition to the expert studies and reports entered into evidence at trial, numerous studies show that student body diversity promotes learning out-comes, and better prepares students for an increasingly diverse workplace and society, and better prepares them as professionals") (internal citations omitted).

The District Court below (affirmed without substantive discussion by the Sixth Circuit)[6] found that the Jefferson County School Board "met its burden of establishing a compelling interest in maintaining racially integrated schools." *Id.* at 855. The District Court supported this conclusion by relying on: (1) The discussion in *Grutter* of the benefits of diversity in the higher-education context in promoting "cross-racial understanding and racial tolerance, preparation for a diverse workplace and training of the nation's future leaders," which the District Court found equally applicable to elementary and secondary schools; *Id.* at 852-53; and (2) the Jefferson County School Board's belief that educational benefits flow to the students and the system as a whole when specific levels of racial balance are achieved. *Id.* at 853 ("the Board believes that integration has produced educational benefits for students of all races."). The District Court acknowledged that the connection between racial balance and student achievement had not in fact been established by the evidence before it. ("The Court cannot be certain to what extent the policy of an integrated school system has contributed to these successes. Opinions surely vary on this issue.") *Id.* The Court went on to indicate that the Board had "valid reasons for believing" that its policies "may aid student performance," but never concluded that any relationship between diversity and student achievement had in fact been established. *Id.* at 854.

The Seattle Plan. The Seattle School District also uses a race-based student assignment plan, which is used to achieve a predetermined racial balance in the Seattle high schools (the "Seattle Plan"). *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 426 F.3d 1162 (9th Cir. 2005). Similar to the Jefferson County Plan, students in Seattle may request their preferred school. *Id.* at 1169-70. If the requested school

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[6] *McFarland ex rel. McFarland v. Jefferson County Pub. Schs.*, 416 F.3d 513 (6th Cir. 2005).

is oversubscribed, students are admitted to schools according to a series of "tiebreakers." *Id.* at 1169-71. Siblings of students currently attending the school are given first preference. *Id.* at 1169. After that, if the requested school is "racially imbalanced"—meaning that the racial composition of the school differs by more than 15% from the racial composition of the school district as a whole—and if the sibling preference does not bring the oversubscribed high school within plus or minus 15% of the District's overall demographics, the race-based tiebreaker is triggered, and thus the race of the applicant student is considered. *Id.* at 1169-70. In the 2000-01 school year, approximately 10% of the incoming students entering Seattle high schools were assigned to their schools based upon the race-based tiebreaker. *Id.* at 1170.

Parents Involved in Community Schools ("PICS") filed a lawsuit claiming that the racial tiebreaker violates their children's equal protection rights. *Id.* at 1171. After several levels of court review, the Ninth Circuit ultimately affirmed the District Court's ruling, which concluded that the Seattle School District has a compelling interest in securing the educational and social benefits of racial diversity, and in ameliorating racial isolation or concentration in its high schools by ensuring that its assignments do not simply replicate Seattle's segregated housing patterns. *Id.* at 1172.

SUMMARY OF ARGUMENT

Amici, as social scientists who have studied and written extensively on issues relating to race, integration, and student achievement, respectfully submit that the scholarship discussing the relationship between attendance at racially diverse or integrated schools and student achievement is not uniform, consistent, or sufficiently conclusive to support a finding that achieving a particular level of racial balance constitutes a "compelling" state interest.

In particular, as discussed below, a comprehensive review of the literature reveals that:

- There is no evidence of a clear and consistent relationship between desegregation and academic achievement, which is the primary purpose of universal public education. Instead, the effects of desegregation are highly variable, depending on any number of conditions—grade, location, test content, and even race or ethnicity. When averaged over large numbers of studies, the effects are generally weak or nonexistent.
- In addition, there is no evidence of a clear and consistent relationship between desegregation and such long-term outcomes as college attendance, occupational status, and wages, a fact that should not be surprising given the weak and inconsistent effect of desegregation on achievement.
- Finally, there is no evidence of a clear and consistent relationship between racial balance in K-12 schools and such social outcomes as racial attitudes, prejudice, race relations, and inter-racial contact. Indeed, among the better-designed studies, more show negative effects on white attitudes than positive effects.

Amici urge the Court, after a review of the relevant scholarship and the record below, to reverse the lower courts' decisions that maintaining racial balance in primary and secondary schools constitutes a compelling state interest.

ARGUMENT

I. THE JEFFERSON COUNTY AND SEATTLE STUDENT ASSIGNMENT PLANS ARE CONSTITUTIONAL ONLY IF THEY SERVE A COMPELLING STATE INTEREST.

The question before the Court is whether the explicit use of race-based student assignment systems, outside of the context of a remedial court-ordered desegregation plan designed to

eliminate the vestiges of prior *de jure* segregation, is consistent with the Court's prior statements that racial balancing violates the Equal Protection Clause. *See Grutter*, 539 U.S. at 330 ("outright racial balancing . . . is patently unconstitutional"); *Freeman v. Pitts*, 503 U.S. 467, 494 (1992) ("Racial balance is not to be achieved for its own sake"); *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 307 (1978) (Powell, J.) (discussing attempts to assure within a student body a specified percentage of a particular group "merely because of its race or ethnic origin" and describing such a plan as "facially invalid").

A. Strict Scrutiny is the Proper Standard of Review.

There can be no question that strict scrutiny applies to the analysis of the Jefferson County and Seattle student assignment plans, which are predominantly based on race. *See Johnson v. California*, 543 U.S. 499, 506 (2005) ("We . . . apply strict scrutiny to *all* racial classifications to 'smoke out' illegitimate uses of race by assuring that [government] is pursuing a goal important enough to warrant use of a highly suspect tool." (emphasis in original)).

B. The Court has Properly Found Very Few Asserted State Interests to be Compelling.

Strict scrutiny review owes its roots to *Toyosaburo Korematsu v. United States*, 323 U.S. 214 (1944). In *Korematsu*, the Court upheld a military Exclusion Order (issued pursuant to an Executive Order) that excluded Japanese-Americans from certain West Coast areas. *Id.* at 216-17. In its justification, the Court found that "pressing public necessity may sometimes justify the existence of [racial discrimination]." *Id.* at 216. The phrase "pressing public necessity" has since developed into "compelling governmental interest." *Grutter*, 539 U.S. at 351 (Thomas, J., dissenting). *Korematsu* presented one of the few circumstances in which the Supreme

Court has upheld a law that permitted Government-sponsored racial discrimination.

Racial classification rarely survives strict scrutiny review. A review of the Court's jurisprudence reveals a host of race-based government actions that have been rejected. *See Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989); *Batson v. Kentucky*, 476 U.S. 79 (1986); *Loving v. Virginia*, 388 U.S. 1, 8 (1967); *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267 (1986); and *Palmore v. Sidoti*, 466 U.S. 429 (1984).

C. *Grutter* Does Not Resolve the Issues in these Cases.

More recently, the Court recognized as a compelling interest the benefits flowing from a diverse student body in the context of higher education. *Grutter*, 539 U.S. at 330.

However, *Grutter* does not address the issues raised in these cases. First, the Court in *Grutter* in part relied upon First Amendment protections recognized in the university context that do not necessarily apply to primary or secondary education. *See Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675 (1986) ("The First Amendment guarantees wide freedom in matters of adult public discourse. . . . It does not follow, however, that . . . the same latitude must be permitted to children in a public school.").

Second, the Court in *Grutter* was clear that the compelling state interest was not the racial diversity itself, but rather was the broader concept of student diversity, in which race might be one of many types of diversity considered. *Grutter*, 539 U.S. at 329-330. Thus, in *Grutter*, the Court relied on the fact that the law school was not seeking any specific level of racial diversity other than that sufficient to constitute a critical mass. *Id.* In fact, the Court distinguished the University of Michigan Law School's use of race as part of individualized evaluation of applicants from the University

of Michigan undergraduate school's inflexible, mechanistic policy of assigning bonus points to applicants from certain preferred minority groups. *Id.* at 337.

Clearly, the plans at issue in these cases do not involve a flexible use of race in the context of individualized evaluation, but instead set firm numerical goals and use race as the predominant means of deciding whether schools are properly constituted. Thus, the asserted interest of the school districts in these cases is in racial balance itself, rather than in the broader diversity that the Court found permissible in *Grutter*. *Compare Loving*, 388 U.S. at 11 ("racial classifications . . . . must be shown to be necessary to the accomplishment of some permissible state objective, *independent of the racial discrimination* which it was the object of the Fourteenth Amendment to eliminate.") (emphasis added).

Finally, and most important in this case, the purported benefits of racial diversity were not disputed in *Grutter*; rather, the majority presumed the validity of the benefits of diversity asserted by the University of Michigan. *Grutter*, 539 U.S. at 347-48 (Scalia, J., dissenting). Even assuming the validity of the benefits cited in *Grutter*, such benefits were of a different kind than those at issue in these cases, because they derived from *general* diversity rather than only racial diversity, and they involved benefits that were meaningful in the context of higher education.

These cases explicitly raise the issue of whether educational and social benefits flow from racial diversity in public elementary and secondary schools, where that diversity is defined by fixed racial percentages. If the Court is to agree with the lower courts in these cases, it must find that this type of racial diversity creates significant educational and social benefits in public elementary and secondary schools. A great deal of social science research has been carried out on this question, and such evidence is simply lacking.

II. SOCIAL SCIENCE RESEARCH DOES NOT SUPPORT A CONCLUSION THAT RACIAL DIVERSITY IN PRIMARY OR SECONDARY EDUCATION CONSTITUTES A COMPELLING STATE INTEREST.

A. Use of Social Science in the Cases Below.

In affirming the constitutionality of Seattle's racial balance plan, the specific benefits cited by the Ninth Circuit include improved academic outcomes (e.g., critical thinking skills), improved race relations and reduced prejudice, and better long-term opportunities in education and employment.[7] The court's conclusions were based primarily on testimony offered by Seattle School District's expert.[8] That testimony also listed the harms of excessive racial concentration in the classroom, which included lower test scores, lower academic achievement, less qualified teachers, and fewer advanced courses.[9]

In the Jefferson County case, the District Court came to similar conclusions, stating that ". . . the Board has met its burden of establishing a compelling interest in maintaining racially integrated schools."[10] It found that racially balanced schools fostered racial tolerance, cross-racial relationships, reduction of racial stereotypes, and increased black student achievement.[11] Regarding academic achievement, the Court said an expert for the Jefferson County School Board "testified that racial integration benefits black students substantially," but it also noted that it was not certain "to what extent

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[7] *Id.* at 1174.

[8] *Id.*

[9] *Id.* at 1177.

[10] *McFarland v. Jefferson County Public Schools*, 330 F. Supp. 2d 834, 855 (W.D.Ky. 2004).

[11] *Id.* at 853.

the policy of an integrated school system contributed to these successes."[12]

Given the gravity of the issue and the enormous ramifications of the use of race for student assignment to schools, the limited social science evidence reviewed in these cases is very surprising. In the Seattle case, a single expert testified for the District. Dr. William T. Trent and his report drew from a relatively small number of studies on educational and social benefits.[13] He cited none of the many studies that find no or only limited benefits from racial balance polices. Indeed, some of the studies he cites are equivocal on the issue of benefits—a point he did not mention.

The Ninth Circuit cited a few additional studies to support the educational benefit thesis, but again it cited no study critical of the evidence.[14] Plaintiff parents submitted expert testimony only in the form of rebuttal to the Trent report, and that testimony was limited to a brief affidavit and a telephone deposition.[15]

In the Jefferson County case, the major testimony about the benefits of racial diversity (other than testimony from School District employees) came from the Jefferson County School Board's expert, Dr. Gary Orfield. He heads the Harvard Civil Rights Project, a self-described advocacy organization for

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[12] *Id.* at 853. The expert was Gary Orfield, head of the Civil Rights Project at Harvard University.

[13] William T. Trent, Ph.D., Expert Report, *Parents Involved in Community Schools v. Seattle School District No. 1*, February 13, 2001.

[14] Two of the studies were law review articles, and the one social science study cited (Erica Frankenberg et al., *A Multiracial Society with Segregated Schools: Are We Losing the Dream*? The Civil Rights Project Harvard University 2003) is published by the Harvard Civil Rights Project.

[15] The Plaintiff's expert was one of the co-authors of this brief, David J. Armor.

school desegregation and racial balance plans. The Project's numerous publications rarely cite studies that do not find significant academic gains from desegregation. The Plaintiff parents did not call any social science expert to testify, and the Court made note of the fact that Plaintiffs did not attempt to rebut the educational benefit thesis.[16]

As such, the evidence introduced in these cases gave the lower courts a very limited and biased record on which to decide whether racial balancing is a compelling government interest. A sound and informed judgment on the question of compelling purpose requires a broader review of the social science literature.

B. Overview of Social Science Studies about the Potential Benefits of School Desegregation.

This review of research on the potential benefits of school desegregation will be divided into three major subject categories[17]: (1) academic achievement, which is conventionally measured by standardized achievement tests; (2) the long-term educational and occupational effects, including college attendance, years of schooling completed, and occupational success including wages and income; and (3) social outcomes which include racial attitudes, race relations, and knowledge about racial and ethnic cultural differences.

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[16] *McFarland*, 330 F. Supp. 2d at 853.

[17] An explanatory note is in order about this research review. Simply stating a finding or a conclusion with a footnote reference is not adequate. As many researchers have noted, there are significant methodological problems in most desegregation research, much of which consists of non-experimental observational studies. (Janet Ward Schofield, *Review of Research on School Desegregation's Impact on Elementary and Secondary Students*, in HANDBOOK OF RESEARCH ON MULTICULTURAL EDUCATION 597 (J.A. Banks & C.A. McGee Banks eds., McMillan 1995). Accordingly, this review will comment on methodological issues when they are germane to inferences being made from a particular study.

A fourth issue mentioned in the Seattle appellate decision concerns the potential harms of racially isolated schools. Since most studies compare outcomes between racially balanced and racially isolated schools, the three categories above also incorporate findings for the consequences of racial isolation.

1. *Academic Achievement*

Academic achievement has been studied more than any outcome in the desegregation research literature, which is understandable. Imparting knowledge and teaching cognitive skills is arguably the central mission of elementary and secondary schools.

One might assume, then, that there would be broad consensus about the effects of desegregation on the achievement of minority students, but this is not the case. On only one point is there any agreement: the impact of desegregation often varies according to grade level, test content, or location (which might mean school, school district, or state). Whether one relies on studies using simple counting methods or, alternatively, on formal meta analyses, results can differ depending on which particular investigations are included in a literature review.[18]

Given the large number of studies of achievement, the following analysis groups them according to whether they were done during the early years of desegregation (1970s and earlier), the middle years (1980s), or more recent years (1990 and later).

Early studies. The most important published studies of achievement during the early years of school desegregation

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[18] By meta analysis, we mean a formal analysis whereby effects from individual studies are quantified and combined to produce an overall quantitative effect estimate with a statistical test of significance.

were those by Armor, St. John, and Gerard and Miller.[19] Each study has a unique reason for its historic significance in the social science debate.

Large-scale school desegregation plans did not become commonplace until the late 1960s, influenced by the passage of the 1964 Civil Rights Act and the Supreme Court's 1968 decision in *Green v. County Sch. Bd. of New Kent County, Va.*, 391 U.S. 430 (1968). The Armor study was the first to review five evaluations of intentionally "generated" desegregation plans (vs. "natural" desegregation from housing patterns) using quasi-experimental designs. Finding few significant black achievement gains in these five programs, it was also the first social science study to conclude that desegregation would not produce major improvements in black achievement and thus close the achievement gap.[20]

St. John's review in 1975 advanced the research on desegregation in several ways.[21] First, she was able to assemble thirty-seven quasi-experimental studies of the effect of desegregation on black achievement, which made hers the largest research review of the more rigorous studies at that time. Second, she classified studies according to certain methodological features and by the effects on achievement they found. St. John concludes,

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[19] A study by Robert L. Crain and Rita E. Mahard, *Desegregation and Black Achievement: A Review of the Research*, 42 Law & Contemp. Probs. 17-56 (1978) was revised into a formal meta-analysis and falls under studies in the 1980s.

[20] David J. Armor, *The Evidence on Busing*, 28 Public Interest 90 (1972). The five programs were the Boston METCO voluntary busing program between Boston and its suburbs; Project Concern, a similar program in Hartford; a major desegregation program in Riverside, California; and desegregation programs in White Plains, New York, and Evanston, Illinois.

[21] Nancy St. John, School Desegregation: Outcomes for Children (Wiley & Sons 1975).

> "Taken together, however, [the studies] suggest that the achievement of black children is rarely harmed thereby, but they provide no strong or clear evidence that such desegregation boosts their achievement. A countdown by grade level and achievement tests, rather than by cities, reveals that a report of no difference is more common than a report of significant gain."

The next significant work was a comprehensive evaluation of desegregation in Riverside, California by Gerard and Miller. Although the study involves only a single school district, it was unique for its large sample of students (1700), its duration of six years, and the number of outcomes assessed.[22] Unlike most studies of desegregation, it included large numbers of Hispanic students as well as black students, and as such it remains one of the largest studies of desegregation's impact on Hispanic students. The authors conclude:

> "Analysis of standardized reading achievement data offers a picture that provides little encouragement for those who see desegregation as a panacea for reducing the achievement gap that so ubiquitously characterizes minority academic performance. While the achievement of Anglo children did not suffer, minority students showed no overall benefit."[23]

Studies in the 1980s. There were only two major studies of desegregation and achievement during the 1980s, but two features make them the most important of the historical studies. First, a larger number of studies of desegregation had become available, making generalization more viable. Second, they used formal meta-analysis, a technique developed during the 1970s. This technique has the advantage of quantifying the effects of desegregation (called "effect" sizes) across many studies. These effect sizes can then be described

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[22] Harold B. Gerard and Norman Miller, School Desegregation: A Long Term Study (Plenum 1975).

[23] Gerard et al., *supra* at 297-298.

by summary statistics instead of simply counting the number of positive, negative, or neutral studies.

An effect size is calculated in standard deviation units, so that an effect of .1 is equivalent to an increase in one-tenth of a standard deviation, or about one month of a school year. The achievement gap between black and white elementary children during the 1970s was approximately one standard deviation, which is equivalent to about one year of growth during the elementary years.

The first formal meta-analysis was published by Crain and Mahard in 1983 using 93 separate studies of the effects of desegregation on black achievement.[24] Studies were classified according to research design (randomized longitudinal, quasi-experimental, etc.), and effect sizes were computed separately for each grade level tested. Effect sizes could be calculated for a total of 268 separate grade samples in the studies.

Over all studies and grade levels, Crain and Mahard found a small effect size of about .08, but the effect size for kindergarten and first grade students averaged about .30, which is quite large. The authors concluded that desegregation had a significant impact on achievement, but only if it started at the very beginning of schooling.

Given the wide variation in conclusions about desegregation's effect on black achievement, the National Institute of Education (NIE) sought to clarify the issue by convening a panel of experts to carry out further meta-analyses.[25] All but one panelist had done prior research on this topic. Thomas

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[24] Robert L. Crain and Rita E. Mahard, *The Effect of Research Methodology on Desegregation-Achievement Studies: A Meta-Analysis*, 88 Am. J. Soc. 839-854 (1983).

[25] Thomas Cook et al., School Desegregation and Black Achievement, (National Institute of Education 1984).

Cook, a noted specialist in methodology, chaired the panel and wrote a summary chapter. The panel established criteria for selecting studies that were most suitable for making causal inferences, which led it to select a total of nineteen.

Each panelist wrote a separate chapter in the report; four of those chapters were separate meta-analyses because each author rejected one or two studies on methodological grounds. One author did not compute effect estimates for 11 of the 19 studies (for technical reasons), and therefore that analysis was considered problematic in Cook's summary. Of the three remaining meta-analyses, the effect of desegregation on reading ranged from .06 to .16 with a mean of .12; the average median was .04. For math, the range was .01 to .08 with a mean of .04 and an average median of -.01. Based on these results, Cook came to the following conclusions:

> "On the average, desegregation did not cause an increase in achievement in mathematics. Desegregation increased mean reading levels. The gain reliably differed from zero and was estimated to be between two to six weeks [of a school year] across the studies examined. . . . The *median* gains were almost always greater than zero but were lower than the means and did not reliably differ from zero. . . . I find the variability in effect sizes more striking and less well understood than any measure of central tendency."[26]

Cook also discussed the difference between the NIE panel's results and those of Crain and Mahard. He noted that their overall mean effect size found by Crain and Mahard was similar to that found by the NIE panel.[27] The difference was

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[26] Thomas D. Cook, *What Have Children Learned Academically from School Integration? An Examination of the Meta-Analytic Evidence*, in SCHOOL DESEGREGATION AND BLACK ACHIEVEMENT 40 (Thomas Cook et al., eds., National Institute of Education 1984).

[27] Cook also notes that a meta-analysis done in a doctoral dissertation also came up with a similar mean effect size of .10 (for studies that had a

due to kindergarten and first grade studies that were included in the Crain and Mahard analysis but not in the panel's studies due to methodological problems. The problem was that most studies of these early grades did not have comparable pre-tests and post-tests, an omission that can lead to inflated effects because children in desegregated schools usually have higher initial ability. Thus Cook says that that Crain and Mahard's estimates "probably result in overestimating the effects of desegregation . . .," but he also said that the issue is not fully resolved and would require further research.[28]

Recent Studies. There were few published studies on the relationship between desegregation and achievement between 1984 and 1994. Between 1995 and 2005, a number of important studies appeared, and some of these studies introduced new types of data and new analytic techniques. By 1995, many school districts had operated desegregation plans for a long time, which allowed case studies that could assess the long-term effects of desegregation in a particular school district.

The first of these recent studies was a more traditional research review by Schofield in 1995.[29] Although it is not a formal meta-analysis, it is one of the most comprehensive literature reviews ever undertaken on all of the educational and social outcomes of desegregation. It reviews more than 250 studies of academic achievement, suspensions and drop-

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control group); Ronald Krol, A Meta Analysis of Comparative Research on the Effects of Desegregation on Academic Achievement, (December 1978) (unpublished Ph.D. dissertation, Western Michigan University) (on file with author).

[28] Cook *supra* at 31.

[29] Janet Ward Schofield, *Review of Research on School Desegregation's Impact on Elementary and Secondary Students*, in HANDBOOK OF RESEARCH ON MULTICULTURAL EDUCATION 597 (J.A. Banks & C.A. McGee Banks eds., McMillan 1995).

outs, long-term outcomes, self-esteem, racial attitudes, and inter-group behaviors.

Schofield reviews all of the work mentioned in this brief as well as some not cited here, but she devotes the most space to a discussion the 1984 NIE study. She found that Cook's "conclusions seem to be a fair summary of the projects outcome . . ." and describes all of the points mentioned above.

> ". . . research suggests that desegregation has had some positive impact on the reading skills of African American youngsters. The effect is not large, nor does it occur in all situations, but a modest measurable effect does seem apparent. Such is not the case with mathematics skills, which seem generally unaffected by desegregation."[30]

Schofield notes that there is very little empirical evidence on Hispanic achievement, concluding that the Gerard and Miller study of Riverside is still the most important source of information about the effect of desegregation on Hispanic students. She repeats their conclusion that ". . . desegregation did not significantly influence the achievement level of any of the groups, including the Mexican American children."[31]

Armor also published reviews of the achievement research literature in 1995 and 2002, all of which have been discussed earlier. But these two works also include a total of seven case studies of long-term achievement trends in large school districts that have undergone extensive desegregation, as discussed below.[32]

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[30] Scholfield *supra* at 610.

[31] Scholfield *supra* at 602.

[32] The first two case studies appear in David J. Armor, *Forced Justice: School Desegregation and the Law* (Oxford 1995); the next five are described in David J. Armor, Desegregation and Academic Achievement, in SCHOOL DESEGREGATION IN THE 21ST CENTURY (C.H. Rossell et al., eds., Greenwood Publishing Group 2002).

After a total racial balance plan was ordered for Pasadena, California, in 1970, there was no change in achievement or the gap over the next four years.[33] Norfolk, Virginia, adopted a complete racial balance plan in 1970, and yet there was no net improvement in achievement or the gap as late as 1977.[34] After Dallas, Texas, adopted a partial desegregation plan in 1976, black achievement did rise significantly over the next ten years and the gap was reduced accordingly; but the black gains in predominantly minority schools were just as large as those in desegregated schools.[35] In Kansas City, Missouri, following implementation of the most expensive desegregation remedy ever ordered by a court, achievement and the gap remained flat over the next ten years (the district was majority black at the start of the plan).[36] After Minneapolis, Minnesota, attained substantial racial balance in 1982, black achievement and the achievement gap remained also relatively unchanged over the next twelve years.[37]

The last two case studies, Wilmington-New Castle County, Delaware, and Charlotte-Mecklenberg, North Carolina, are particularly important because their desegregation plans were county-wide, encompassing both city and county suburban schools. Not only were minority children exposed to middle-class white environments, but the predominant white enrollments in the counties enabled high levels of racial balance for many years despite significant white flight. The Wilmington-New Castle County plan was adopted in 1976 and modified in 1982; achievement scores were available from 1982 to 1993. Despite these relatively ideal conditions, the achievement gap

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[33] Armor, *Forced Justice*, *supra* at 77-78 (Oxford 1995).

[34] *Id.* at 79-81.

[35] Armor, Desegregation and Academic Achievement, *supra* at 161-62.

[36] *Id.* at 167-69.

[37] *Id.* at 173, 175.

remained flat and, between 1989 and 1993, the reading gap was slightly larger than the national reading gap.[38]

By virtue of the Supreme Court's decision in *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971), Charlotte-Mecklenburg implemented a comprehensive racial balance plan in 1971, and it maintained highly integrated schools for the next twenty years. Black and white achievement rose significantly between 1978 and 1985, but black achievement rose somewhat faster and the achievement gap declined from 40 to 30 percentile points. A new achievement battery was introduced in 1986, at which time both black and white achievement declined. At this time, the achievement gap returned to 40 percentile points where it remained until 1992. The case study also showed that, in 1998, there was no significant relationship between school racial composition and either reading or math achievement for black elementary students. Thus Charlotte-Mecklenburg, often described as the best example of desegregation in the nation, shows no net reduction in the achievement gap over a 15 year period.[39]

Finally, a new study by Armor examines the national relationship between school racial and ethnic composition and achievement using the 2003 National Assessment of Educational Progress (NAEP).[40] After controlling for student socioeconomic status, the study found no relationship between Hispanic concentration and Hispanic achievement, and this lack of relationship was also observed for both California and

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[38] *Id.* at 162-67.

[39] *Id.* at 169-72; 174.

[40] David J. Armor, Statement to the U.S. Commission on Civil Rights: *The Outcomes of School Desegregation in the Public Schools* (July 28, 2006).

Texas which have the largest number of Hispanic students in predominantly Hispanic schools.[41]

2. *Long Term Outcomes*

Some research reviews have concluded that the long-term benefits of desegregation are greater than short-term benefits such as test scores.[42] The available research does not justify this conclusion. With regard to the long-term impact on levels of educational attainment (college attendance, for instance), wages, and occupational status, the research fails to indicate clear benefits of desegregation. With respect to one long-term outcome—more desegregated adult environments —*amici* do not dispute the relationship but disagree with the interpretation that it is a benefit that can be traced to school desegregation.

Desegregated Adult Environments. There are two major reviews of school desegregation and the degree to which

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[41] There are some recent studies by economists, including a study by Hanushek and others using Texas data, that employ very complex econometric models. The Hanushek study suggests a very large negative effect of black concentration, which is not consistent with the case studies above and may reflect a problem with the model or the data. Eric A. Hanushek, et al., *New Evidence about Brown v. Board of Education: The Complex Effects of School Racial Composition on Achievement* (Nat'l. Bur. of Econ. Research, Working Paper No. 8741, 2002; revised manuscript, February 2004). Other econometric studies also controlling for peer ability do not find significant racial composition effects. See, for example, Caroline M. Hoxby and Gretchen Weingarth, *Taking Race Out of the Equation: School Reassignment and the Structure of Peer Effects,* (Department of Economics, Harvard University, 2005). Much more research is needed before any policy implications can be drawn from this work.

[42] *See, i.e.*, Amy Stuart Wells and Robert L. Crain, *Perpetuation Theory and the Long-Term Effects of School Desegregation*, 64 Rev. of Educ. Res 531-556 (1994), and Jomills H. Braddock II and Tamela M. Eitle, *The Effects of School Desegregation*, in HANDBOOK OF RESEARCH ON MULTICULTURAL EDUCATION 828 (Banks and Banks eds., McMillan 2d. ed. 2004).

adults choose racially integrated settings later in life.[43] Rather than discuss these studies in detail, it can be acknowledged that there is significant relationship between black students attending a desegregated high school and attending a predominantly white college, and a somewhat weaker relationship with working in predominantly white employment settings.

Amici disagree that these relationships can be characterized as benefits of desegregation, however. Although the self-selection problem plagues all long-term outcome studies, it is a greater problem here. Since African American parents differ in their preference for integrated environments—especially with respect to their place of residence or the schools their children attend—students who attend integrated high schools are more likely be from families who prefer such environments, and thus their children also tend to prefer integrated environments when they become adults. That is, family preference for integrated environments is the most likely causal variable here, not school desegregation per se. Since both the cause and the effect are desegregated environments, the only way to disentangle this relationship is by means of a controlled experiment.

Educational Attainment. The fact that black students from desegregated high schools prefer predominantly white colleges doesn't tell us whether they are more likely to seek post-secondary education. In fact, that question has been studied, and the results suggest no or a very small relationship between school desegregation and college attendance.

One of earliest national studies found that the relationship between desegregation and attending college differed be-

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[43] *See* Wells et al. supra, and also Marvin P. Dawkins and Jomills Henry Braddock II, *The Continuing Significance of Desegregation: School Racial Composition and African American Inclusion in American Society*, 63 Journal of Negro Educ. (3) 394 (1994).

tween black students in the North and the South.[44] Controlling for family socioeconomic status, Crain and Mahard found that attending desegregated high schools raised college attendance slightly in the North (standardized effect of +.11) but lowered it in the South (standardized effect of -.07). However, neither relationship was statistically significant.

Using the same data but a different analytic model, Eckard controlled for test scores, family socioeconomic status, high school grades, and being in a college prep curriculum, and found that the relationship between high school desegregation and college attendance was virtually zero.[45] In a later study using the same data, Braddock and McPartland came to similar conclusions as Crain and Mahard: No relationship in the South and a small positive relationship in the North that was not statistically significant.[46]

One of the better studies of this question was by Crain and others using data from Project Concern, a long-running desegregation program involving voluntary transfers of black students from Hartford, Connecticut, schools to desegregated suburban schools.[47] The advantage of this study is that it used a quasi-experimental design, so that Project Concern students could be compared to a control group of students who remained in predominantly black Hartford schools.

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[44] Robert L Crain and Rita Mahard, *School Racial Compositions and Black College Attendance and Achievement Test Performance*, 51 Soc. of Educ. 81-101 (1978).

[45] Bruce K. Eckland, *School Racial Composition and College Attendance Revisited*, 52 Soc. of Educ. 122-125 (1979).

[46] Jomills H. Braddock II and James M. McPartland, 3 *Assessing School Desegregation Effects: New Directions in Research*, Research in Soc. of Educ. and Socialization 259-282 (1982).

[47] Robert L. Crain et al., *Finding Niches: Desegregated Students Sixteen Years Later*, Columbia University: Teachers College, January 1989.

After controlling for gender, family background, and test scores, there was no difference in college attendance between all Project Concern students and the Hartford control group. Moreover, some students spent a substantial number of years in desegregated suburban schools, but then returned to the Hartford schools, and they were no more likely to attend college than those who had remained in the city all along.[48]

Finally, a study by Boozer, Krueger, and Wolkon used data from the National Survey of black Americans to estimate the relationship between the percent of black students in a high school and total years of education. After controlling for self-selection effects, the relationship was not statistically significant.[49]

Occupations and Wages. There is very little research on the link between desegregation and occupation or wage attainment. Because of the weak relationship between desegregation and college attendance, we would not expect much of a connection between desegregation and the rate of white collar (vs. blue collar) jobs, since college is the primary determinant of this distinction.

An unpublished study by Dawkins in 1991 finds some relationship between desegregation and higher occupational relationship for younger adults, but the relationships are "weak and inconsistent for respondents from the South . . ."[50]

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[48] *See* Armor, *Forced Justice*, *supra* at 108-111 for more detailed discussion of the Project Concern study.

[49] The effect associated with attending a 90% vs. 30% black high school would be a reduction of about ¼ year in total years of education. Michael A. Boozer et al., *Race and School Quality since Brown v. Board of Education*, Brookings Institution Papers on Economic Activity, Microeconomics, 269-338 (1992).

[50] Marvin P. Dawkins, *Long-term Effects of School Desegregation on African Americans*, (unpublished paper, University of Miami, 1991); the quote is from Wells et al. *supra* at 551.

Another study of occupational attainment by Crain and Strauss using the Project Concern data find that "when self-selection bias is removed, it appears as though school desegregation does not have much effect on the occupational attainment of black men with no college education. . . ."[51]

The Boozer study also estimated the relationship between high school black composition and wages. As for educational attainment, they found a small negative impact on wages but it was not statistically significant after controlling for self-selection bias.[52]

3. *Social Outcomes*

Studies of desegregation have evaluated several categories of non-educational "social" outcomes. Social outcomes include self-esteem or self-concept, racial attitudes, and race relations. There are also survey studies that ask students about their desegregation experiences and their opinions about personal benefits.

At the outset it should be noted that studies on the social outcomes of desegregation differ in several ways from the literature on academic achievement. First, most of the studies focus on the impact of desegregation on both white and minority students. Second, the lack of standardized measures of social impact hampers generalization. Finally, reviewers have expressed dissatisfaction with the methodological adequacy of these studies.[53]

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[51] Robert L. Crain and J. Strauss, *School Desegregation and Black Occupational Attainment: Results from a Long-term Experiment*, The Social Organization of Schools, Report No. 359 (1985); the quote is from Wells et al., *supra* at 548.

[52] Boozer *supra* Table 8, at 304.

[53] Schofield *supra* at 609. *See also* Armor, *Forced Justice*, *supra at* 99-101.

Self-esteem. Since neither of the lower courts in Seattle or Jefferson County mentioned black self-esteem as a benefit of desegregation, only a brief comment is necessary here. There is substantial consensus that "[t]he major reviews of school desegregation and African American self-concept or self-esteem generally conclude that desegregation has no clear-cut impact."[54]

Racial Attitudes and Race Relations. The first of these reviews was done by St. John in 1975.[55] She looked at 27 studies that compared the prejudicial attitudes of students in segregated v. desegregated schools and presented the results separately for blacks and whites. For blacks, she found negative effects in six studies (desegregation worsened prejudice), positive effects in five studies (prejudice was reduced), and no or mixed effects in three studies. For whites the breakdown was eight, eight, and three, respectively.

St. John also examined a separate group of 17 studies that used friendship choices as the outcome measure. For black students she classified one study as positive (desegregation produced more cross-race friendships), four studies as negative (fewer friendships), and nine with mixed or no effects. For whites, three found more friendships, three found fewer, and ten showed mixed or no results. So the evidence draws a mixed picture, but there is some indication that desegregation may worsen white prejudice, since only one suggested a positive impact, while four found a negative impact. St. John explained these results by suggesting that the conditions for reducing prejudice and improving race relations may not be present in many school settings where there are large differences in levels of academic attainment between racial groups.

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[54] Schofield *supra* at 607.

[55] St. John *supra* at 72.

A second major review was published by Stephan in 1986; some of the studies overlap those of St. John, but there were several newer studies in this review.[56] The results were similar for whites but slightly different for blacks. He found prejudice worsened for blacks in four studies, lessened in eight, and showed no change in another eight. For whites the comparable figures were eleven, four, and nine. Thus, while Stephan found that positive studies outnumbered negative studies for blacks, like St. John he also found that the reverse was true for whites. This is of special concern since white prejudice gave rise to state-sponsored segregation in the first place.

Two other studies looking at social outcomes have some unique features which deserve special emphasis. One is the study of desegregation by Gerard and Miller in Riverside, California. It tracked friendship measures for six years, giving students ample time to recover from some of the short-term disruptions which characterize many desegregation plans, and it is one of the few studies of Hispanic desegregation. Some theoretical perspectives would predict that interracial friendships should increase over time, but the Riverside study found just the opposite: the number of black and Hispanic students chosen as friends decreased.[57]

The other study was done by Patchen using a large survey of students in Indianapolis high schools.[58] He studied the relationship between racial attitudes and the black percentage in classrooms. He found that both blacks and whites had the

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[56] Walter G. Stephan, *The Effects of School Desegregation: An Evaluation 30 Years after Brown*, in ADVANCES IN APPLIED SOCIAL PSYCHOLOGY 181 (M. Saks and L. Saxe, eds., Erlbaum Assoc., 1986).

[57] Whites chose 1.5 blacks and Hispanics as friends after one year of desegregation; after 6 years, the rates fell to 1.1 for hispanics and 1.0 for blacks.

[58] Martin Patchen, *Black-White Contact in Schools: Its Social and Academic Effects*, 145 at Fig. 7.4 (Purdue University Press 1982).

most positive attitudes towards the opposite race in those classrooms that averaged more than 70 percent black. The most negative attitudes were found for those in integrated classes averaging between 20 and 40 percent black, although the attitudes became somewhat more positive when the percent black dropped below 20 percent. The author concluded that the "ideally" integrated classrooms had the highest levels of friction, in part due to academic competition.

There have not been many new studies comparing attitudes among segregated and desegregated students since the Patchen study, and thus the most recent comprehensive reviews of racial attitudes do not alter the conclusions first reached by St. John. The review by Schofield in 1995 concludes: "There is no guarantee that desegregation will promote positive intergroup behavior," and also "The evidence on the impact of desegregation on intergroup relations is generally held to be inconclusive and inconsistent."[59] Schofield came to much the same conclusion in a 1991 review of research on the same question.[60]

Surveys of Personal Benefits. Another possible social outcome of desegregation is what might be called perceived "personal" benefits. These personal benefits are determined through surveys of students from desegregated schools, and some of these studies report generally positive reactions to the desegregation experience. According to these surveys, students mention such personal benefits as cross-racial friendships, learning how to work and get along with students of different races and ethnicities, and increasing their knowledge about racial and cultural differences.

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[59] Schofield *supra* at 610-611.

[60] Janet Ward Schofield, *School Desegregation and Intergroup Relations: A Review of the Literature*, 17 Review of Res. in Educ. 335-412 (American Educational Research Association 1991).

A student survey of this type was conducted on Jefferson County 11th graders and introduced as evidence by Defendants.[61] Wells conducted a national survey of students who graduated from racially mixed high schools in six cities, and similar findings emerged.[62]

One can presume that many students in desegregated schools will perceive personal benefits from a desegregation experience. However, most of these surveys do not have a comparable control group of students from racially isolated schools, and therefore these studies are not designed to detect how much of particular attitudes can be attributed specifically to experiences in the desegregated school versus experiences in the larger society.

CONCLUSION

In deciding that the use of race is a compelling government purpose in the Jefferson County and Seattle racial balance plans, the lower courts relied on an incomplete record of research on the educational and social benefits of desegregation. Given the national implications of the use of race in school assignments, a conclusion that racial balance is a compelling state interest should be based on clear and consistent evidence of benefits. In fact, a fair and comprehensive analysis of the research shows that there is no clear and consistent evidence of benefits for any of the educational and social outcomes cited by the lower courts.

For the reasons cited herein, the Court should reverse the rulings of the Sixth and Ninth Circuits, and find that there is no compelling state interest in racial balancing.

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[61] *See* Brief of the Civil Rights Project at Harvard University as Amicus Curia, 2004.

[62] Amy Stuart Wells et al., *How Desegregation Changed Us: The effects of Racially Mixed Schools on Students and Society*, Teachers College, Columbia University (April 2004).

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